

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
SAN FRANCISCO IVDS, INC.)	
)	
To Renew the License for Station KIVD0012, San Francisco, California in the 218-219 MHz Service; and,)	FCC File No. R393705
)	
Petition for Reinstatement of License and for Reinstatement of Application for Renewal of License)	FCC File No. MTS 2002031333
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 2005

Released: January 28, 2005

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review filed on February 24, 2003, by San Francisco IVDS, Inc. (San Francisco IVDS).¹ In 2001, the former Public Safety and Private Wireless Division (Division)² issued a *Memorandum Opinion and Order (MO&O)* denying San Francisco IVDS's petition for reinstatement of the above-captioned license and request for waiver of Sections 1.949(a) and 1.955(a)(1) of the Commission's rules,³ under which a license automatically cancels without further Commission action unless a timely application for renewal is filed.⁴ In its Application for Review, San Francisco IVDS seeks review of the decision issued in 2003⁵ denying San Francisco IVDS's petition that sought reconsideration of the Division's *MO&O*.⁶ For the reasons discussed below, we grant the Application for Review.

II. BACKGROUND

2. The license for Station KIVD0012 was granted to San Francisco IVDS on March 28, 1994, for a five-year term, authorizing service on the 218-219 MHz band. Section 1.949(a) of the

¹ Application for Review, filed by San Francisco IVDS, Inc. (Feb. 24, 2003) (Application for Review).

² In late 2003, the Commission's Wireless Telecommunications Bureau was reorganized. We note that the mobile radio service licensing issues related to the 218-219 MHz Service, which were previously handled by the Bureau's Public Safety and Private Wireless Division, are now under the purview of the Bureau's Mobility Division. FCC's Wireless Bureau Announces Reorganization, *Public Notice* (rel. Nov. 24, 2003); Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414 ¶ 2 (2003).

³ San Francisco IVDS, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 18008 (2001) (*MO&O*).

⁴ 47 C.F.R. §§ 1.949(a), 1.955(a)(1).

⁵ San Francisco IVDS, Inc., *Memorandum Opinion and Order on Reconsideration*, 18 FCC Rcd 724 (2003) (*Order on Reconsideration*).

⁶ Petition for Reconsideration, filed by San Francisco IVDS, Inc. (Nov. 13, 2001) (Reconsideration Petition).

Commission's rules requires licensees to file applications for renewal no later than the expiration date of the authorization and no sooner than 90 days prior to expiration.⁷ Section 1.955(a)(1) of the Commission's rules provides that, unless a timely application for renewal is filed, the license automatically cancels without further Commission action.⁸ The expiration date for Station KIVD0012 was March 28, 1999. San Francisco IVDS, however, did not file a renewal application before or on that date.⁹ Nearly two months after the expiration date, on May 21, 1999, San Francisco IVDS did file a renewal application for Station KIVD0012,¹⁰ but it did not include a request for waiver of the Commission's filing deadlines.¹¹

3. During the license term for Station KIVD0012, the Commission initiated a rulemaking proceeding regarding its service rules for the 218-219 MHz band. Specifically, on September 17, 1998, the Commission sought comment on numerous modifications to the licensing and technical rules for the 218-219 MHz Service, including changing the license term from five to ten years.¹² On September 7, 1999, the Commission revised its 218-219 MHz service rules.¹³ In relevant part, the Commission changed the license term from five to ten years for licenses granted by lottery on March 24, 1994, and who had timely filed renewal applications or timely filed waiver requests pending at the FCC.¹⁴

4. On August 7, 2000, the Division's Licensing and Technical Analysis Branch dismissed San Francisco IVDS's renewal application as untimely.¹⁵ On September 6, 2000, San Francisco IVDS filed its petition for reinstatement, which requested a waiver of Sections 1.949(a) and 1.955(a)(1) of the Commission's rules to permit renewal of its automatically cancelled license.¹⁶ On October 12, 2001, the Division denied San Francisco IVDS's petition for reinstatement and waiver request.¹⁷ San Francisco

⁷ 47 C.F.R. § 1.949(a).

⁸ 47 C.F.R. § 1.955(a)(1).

⁹ *MO&O*, 16 FCC Rcd at 18009 ¶ 3.

¹⁰ FCC File No. R393705 (filed May 21, 1999).

¹¹ *MO&O*, 16 FCC Rcd at 18009 ¶ 3. The late-filed renewal policy in effect at that time allowed licensees to file an application to reinstate an expired license within thirty days after the license expiration date. In October 1998, in the *ULS Report and Order*, the Commission abolished this 30-day reinstatement procedure. Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Report and Order*, 13 FCC Rcd 21027 (1998) (*ULS Report and Order*). However, before the changes contemplated by the *ULS Report and Order* became effective, the Commission adopted its current late-filed renewal policy. Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11476 (1999) (*ULS Order on Reconsideration*).

¹² Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064 (1998).

¹³ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999) (*218-219 MHz Flex R&O*).

¹⁴ *Id.*, 15 FCC Rcd at 1517 ¶ 32.

¹⁵ *Order on Reconsideration*, 18 FCC Rcd at 726 ¶ 6.

¹⁶ *Id.*

¹⁷ *Id.* at 726 ¶ 7. The petition for reinstatement and waiver request would normally be considered only in the context of an underlying application. While San Francisco IVDS's renewal application had been dismissed, the Division
(continued....)

IVDS requested reconsideration of that decision on November 13, 2001.¹⁸ Upon review, the Division upheld its earlier findings and denied the Reconsideration Petition.¹⁹

5. In its Application for Review, San Francisco IVDS states that the Division inappropriately “focused exclusively on procedural issues” instead of considering “the substantive facts and circumstances in the case.”²⁰ It also claims that the Division failed to employ the standard for late-filed renewal applications set forth in the Commission’s universal licensing system (ULS) proceeding, and it disagrees with the Division’s finding that the failure to file a waiver request with the initial renewal application is fatal.²¹

III. DISCUSSION

6. As an initial matter, we reject San Francisco IVDS’s argument that the requirement that late-filed renewal applications include a request for waiver violates the notice requirements outlined in *Salzer v. FCC*.²² In 1999, the Commission adopted a new policy regarding the treatment of late-filed renewal applications in the Wireless Radio Services.²³ Under this policy, where a renewal application is filed before the end of thirty days after the license expiration date, the renewal application will be granted as long as the application otherwise complies with all other Commission rules.²⁴ In cases where the renewal application is filed more than thirty days after the license expiration date, the applicant may also request renewal, but such requests are not routinely granted, are subject to stricter review, and also may be accompanied by enforcement action.²⁵ In determining whether to grant an application filed more than thirty days after the license expiration date, the Commission takes into consideration all of the facts and circumstances involved, including the length in delay of filing, the licensee’s performance record, the reasons for the failure to timely file, and the potential consequences to the public if the license were terminated.²⁶

7. San Francisco IVDS claims that there was insufficient notice in the *ULS Order on Reconsideration*, because the Commission did not “specifically demand that a late renewal application be accompanied by a waiver request.”²⁷ We disagree. The *ULS Order on Reconsideration* describes the level of scrutiny that we will give to late-filed renewal applications and also states that applications must comply with all Commission rules before they will be granted. Section 1.934(d)(2) of our rules

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noted that, in these particular circumstances, the public interest would not be served by requiring the filing of an underlying application, which would result in a later filing date for the associated waiver request. The Division used the filing date of the petition for reinstatement as the filing date for conducting its analysis of the waiver request. *Id.*

¹⁸ Reconsideration Petition.

¹⁹ *Order on Reconsideration*, 18 FCC Rcd 724 (2003).

²⁰ Application for Review at 7.

²¹ *Id.* at 6-16.

²² See Application for Review at 15; *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985). In *Salzer*, the court held, *inter alia*, that the Commission must provide explicit notice of all application requirements as a *quid pro quo* for stringent acceptability criteria.

²³ *ULS Order on Reconsideration*, 14 FCC Rcd 11476.

²⁴ *Id.*, 14 FCC Rcd at 11485-86 ¶ 22.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Application for Review at 16.

authorizes the Commission to dismiss any application found to be defective.²⁸ An application may be considered defective if it requests an authorization that would not comply with the Commission's rules and "does not contain a request for waiver."²⁹ San Francisco IVDS's late-filed renewal application violated Section 1.949(a), which requires that renewal applications be filed prior to the expiration date of the license. Consequently, Commission rules required San Francisco IVDS to seek a waiver of that rule at the time it filed its renewal application.³⁰ The absence of an express reference to a waiver requirement in the Commission's discussion of the level of scrutiny that will be applied in reviewing a request for renewal of a late-filed renewal application—or any other request for waiver of the Commission licensing rules—does not violate the requirement that adequate notice be provided.

8. Nonetheless, we find that this case presents unusual factual circumstances that warrant grant of the Application for Review. Pursuant to Section 1.925 of our rules, we may grant a waiver if it is shown that: (a) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (b) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest or the applicant has no reasonable alternative.³¹

9. We find that the unusual factual circumstances of this proceeding render the strict application of Section 1.949(a) inequitable, unduly burdensome, or contrary to the public interest. Specifically, we conclude that San Francisco IVDS's failure to request a waiver of Section 1.949(a) to obtain renewal until (1) dismissal of its defective application and (2) eighteen months after the license expired is outweighed by the other factors to be considered under our late-filed renewal policy.³²

10. The 218-219 MHz Service rulemaking proceeding, which resulted, *inter alia*, in the extension of 218-219 MHz Service licenses from five to ten years, was launched on September 17, 1998, and completed on September 10, 1999. Moreover, the new Wireless Services renewal policy was not released until June 28, 1999, more than a month after San Francisco filed its renewal application. We agree with San Francisco IVDS that the combination of these events were unusual circumstances that contributed to a confusing situation.³³

11. We conclude that *Self Communications*³⁴ supports a finding that unusual circumstances contributed to the licensee's conclusion, albeit erroneous, that it was not required to file a renewal application prior to the original expiration date for the subject license, March 28, 1999.³⁵ In *Self*, where

²⁸ 47 C.F.R. § 1.934(d)(2).

²⁹ *Id.*

³⁰ In addition, Section 1.955(a)(1) specifies that licenses "automatically terminate" on the license expiration date unless a timely renewal application is filed. 47 C.F.R. § 1.955(a)(1). Without a waiver of this rule, San Francisco IVDS would have nothing to renew. We also note that it is incumbent upon the applicant to make its case under the late-filed renewal policy. Applicants should present their evidence and analysis as part of their waiver request.

³¹ 47 C.F.R. § 1.925(b)(3).

³² See *ULS Order on Reconsideration*, 14 FCC Rcd 11476 (1999).

³³ Application for Review at 3-5.

³⁴ *Self Communications, Inc., Order and Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 18661 (2000) (*Self Communications*).

³⁵ Application for Review at 14.

the 218-219 MHz Service licensee filed a late renewal application and waiver request,³⁶ the Division specifically found that “the scheduled expiration of a license during the pendency of a rule making which addresses the duration of the term for such license (given that the construction benchmarks associated with the license have been waived pending the resolution of the rule making) is an unusual circumstance.”³⁷ That Order also held that in light of such unusual circumstances, application of the Commission’s rules “would be unduly burdensome,” and the Division accordingly reinstated the expired license.³⁸

12. We agree with San Francisco IVDS that the same unusual circumstances that were found in *Self* are present here, *i.e.*, the pendency of the 218-219 MHz Service rulemaking confused the licensee regarding the need to file a renewal application. In addition, we take notice that the 218-219 MHz Service is a struggling one and has been from the outset when its predecessor, the Interactive Video and Data Service (IVDS), was established. The band has several technical restrictions that preclude its use for typical commercial services such as land mobile radio. Many 218-219 MHz Service licensees that initially saw promise in the service let their licenses expire without making any attempt to offer service. We thus perceive that it takes a combination of technical innovation and business entrepreneurship to develop and execute a viable business plan for this band. In light of this, we find it highly significant that San Francisco IVDS was actually offering service to customers at the time its license expired.³⁹ Moreover, San Francisco IVDS evidenced its intent to continue operating pursuant to its license with the filing by its sole proprietor of a request for waiver of Part 95 technical and operating rules.⁴⁰ Finally, we find no indication whatsoever of bad faith on San Francisco IVDS’s part, although we remind San Francisco IVDS and all other licensees that it is the responsibility of each applicant and licensee to remain in compliance with our rules.⁴¹

13. This is a close case. Of the mitigating factors present, no single one would justify granting San Francisco IVDS’s license renewal application. However, taken in combination—and considering the time at which they occurred—the composite of mitigating factors very slightly tips the scales in San

³⁶ Eighteen licenses in the 218-210 MHz Service system licenses were awarded by lottery with a license term of five years. The licenses were granted on March 28, 1994. The expiration date for the license in *Self Communications* was the same as for San Francisco IVDS.

³⁷ *Self Communications*, 15 FCC Rcd at 18663 ¶ 6.

³⁸ *Id.*, 15 FCC Rcd at 18663-64 ¶ 7.

³⁹ See Application for Review at 10.

⁴⁰ On April 17, 1997, Raveesh K. Kumra, the principal of San Francisco IVDS, filed a request for waiver of certain technical rules relating to the 218-219 MHz band. See Raveesh K. Kumra Request for Waiver (filed Apr. 17, 1997). Mr. Kumra sought waiver of the antenna height and power limitations contained in Section 95.859(a) of the Commission’s rules, as well as the duty cycle limitations contained in Section 95.863(a) of the Commission’s rules. *Id.* The Commission incorporated Kumra’s waiver request, as well as other related waiver requests, into the record of the pending rulemaking proceeding. See Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission’s Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19094 n.201 (1998).

⁴¹ We caution that each licensee is solely responsible for knowing the term of its license and submitting a renewal application in a timely manner. *ULS Order on Reconsideration*, 14 FCC Rcd at 11485 ¶ 21; see also *Sierra Pacific Power Company, Order*, 16 FCC Rcd 188, 190-91 ¶ 6 (2001) (“each licensee bears the exclusive responsibility of filing a timely renewal application”); *World Learning, Order*, 15 FCC Rcd 23871, 23872 ¶ 4 (2000) (licensee “is solely responsible for filing a timely renewal application”); *First National Bank of Berryville, Order*, 15 FCC Rcd 19693, 19695 ¶ 8 (2000) (“it is the responsibility of each licensee to renew its application prior to the expiration date of the license”); and *Montana Power Company, Order*, 14 FCC Rcd 21114, 21117 ¶ 7 (1999) (“it is the responsibility of each licensee to apply to renew its license prior to the license’s expiration date”).

Francisco IVDS's favor and we thus grant its Application for Review and renew its license for a ten-year period that began on March 28, 2004, and ends on March 28, 2014.⁴²

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by San Francisco IVDS, Inc. on February 24, 2003, IS GRANTED.

15. Accordingly, IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.925, 1.949, and 95.812 of the Commission's rules, §§ 1.925, 1.949, 95.812, the license for Station KIVD0012, San Francisco, California IS REINSTATED AND RENEWED with an expiration date of March 28, 2014.

16. Accordingly, IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.946 and 95.833 of the Commission's rules, §§ 1.946, 95.833, the construction deadline for Station KIVD0012, San Francisco, California is March 28, 2009.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴² We note that the construction deadline for the 218-219 MHz Service is ten years from the license grant. *See* 47 C.F.R. § 95.833. Because of the circumstances present in this case, we will allow San Francisco IVDS another five years—from the date that its license would have expired had its renewal application been granted by the Division—to demonstrate substantial service under our construction requirements.